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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Tony Clarence Memory,

10 Plaintiff,

11 v.

12 EmployBridge,

13 Defendant.
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No. CV-23-00481-TUC-LCK

ORDER

15 Pending before the Court is Defendant EmployBridge DBA Prologistix's Motion to
16 Dismiss Plaintiff's Second Amended Complaint pursuant to Federal Rule of Civil
17 Procedure 12(b)(6).¹ (Doc. 23.) Plaintiff filed a response and Defendant replied. (Docs. 25,
18 26.) The Court will grant the motion and dismiss Plaintiff's case.

19 **FACTUAL AND PROCEDURAL BACKGROUND**

20 Plaintiff initiated this action with a Complaint filed on October 24, 2023. (Doc. 1.)
21 Defendant's counsel contacted Plaintiff and notified him that Defendant intended to file a
22 motion to dismiss. (Doc. 23-1.) Defendant set forth its intended basis for the motion,
23 including the statute of limitations and the absence of all elements necessary to allege
24 discrimination or retaliation. (*Id.*) In response, Plaintiff filed an Amended Complaint on
25 January 30, 2024. (*Id.*; Doc. 9.) Defendant's counsel contacted Plaintiff again, notifying
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28 ¹ EmployBridge DBA ProLogistix states that it is improperly named as the Defendant because it is not the entity through which Plaintiff sought employment. However, Defendant did not move for dismissal on that basis.

1 him of Defendant's intent to seek dismissal of his amended pleading based on the statute
 2 of limitations and his failure to state a claim for discrimination and retaliation. (Doc. 23-
 3 2.) Plaintiff elected not to amend a second time. (Doc. 23-3.) The Court granted
 4 Defendant's motion to dismiss but provided Plaintiff with an explanation of the basis for
 5 its ruling and granted him leave to amend. (Doc. 19.)

6 Plaintiff filed a Second Amended Complaint, which Defendant now seeks to have
 7 dismissed. Plaintiff's Second Amended Complaint alleges Title VII employment
 8 discrimination based on race, retaliation, and a violation of Arizona's blacklisting statute.
 9 (Doc. 21 at 3-4.) He alleges that, in 2016, 2017, 2018, 2020, and 2022, Defendant retaliated
 10 against him for filing a 2016 EEOC complaint. (*Id.* at 4; Doc. 21-3 at 20-21.) Plaintiff
 11 included the following factual allegations in the Second Amended Complaint:

12 After a 2016 Racist/biased encounter at a Tampa FL office branch against
 13 brown and black people. I filed a complaint with the EEOC. eeoc didn't find
 14 anything but Mandy Johnson and Ashley Boulle were later Terminated in
 15 2017 after I tipped off Leyda Guzman a Hispanic employee to watch her.
 16 Sense [sic] then This company Bitter, blocked me in Florida from 2016-2023
 17 and Arizona from 2021 to Present WITHOUT A LISTED REASON. I had
 18 some small angry words with that office during the complaint process like
 "ASS, DAMN, FUCK, DEMON GIRL" but never vile or derogatory like My
 genitals or hers or C-word against whites, or death threats. just protesting
 words. I was very respectful to the corporate offices just not to Mandy,
 regardless they continued to block me if I ever wanted to work a suitable job.
 Previously they had a "listed" reason, then after 2017 they left me blocked
 "WITHOUT A REASON."

19 (Doc. 21 at 5.)

20 Plaintiff alleged that he filed a complaint with the EEOC on November 2, 2022, to
 21 exhaust his federal administrative remedies. (*Id.*) In his administrative charge of
 22 discrimination, he stated that he had applied several times to work for Defendant and was
 23 rejected; he believed that rejection was due to Defendant blocking him based on his race
 24 and his complaints about discriminatory treatment. (Doc. 21-1 at 8.) He also asserted that,
 25 around August 28, 2022, he received three rejection notices from Defendant. (*Id.*) The
 26 EEOC issued him a right to sue letter on October 19, 2023.² (*Id.* at 4.) Plaintiff seeks

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 28 ² Plaintiff alleges he received the Right to Sue letter on July 31, 2023. (Doc. 21 at 5.) However, it was the Office of the Attorney General of Arizona that issued a dismissal and notice of right to sue in July 2023. (Doc. 21-1 at 5-6.) The EEOC subsequently adopted

1 \$1,000,000 and a Court order directing Defendant to remove the block that prevents him
2 from seeking employment with the company. (Doc. 21 at 6.)

3 STANDARD OF REVIEW

4 "To survive a motion to dismiss, a complaint must contain sufficient factual matter,
5 accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,
6 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).
7 Dismissal is only appropriate if the complaint's factual allegations, together with all
8 reasonable inferences drawn in the plaintiff's favor, fail to state a plausible claim for relief.
9 *Id.* at 678; *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (allegations in the complaint
10 must be construed in the light most favorable to the plaintiff). While a complaint need not
11 plead "detailed factual allegations," the factual allegations it does include "must be enough
12 to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545. The
13 plausibility standard does not amount to a probability requirement, however, it demands
14 "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at
15 678. Where the pleader is *pro se*, the pleading should be liberally construed in the interests
16 of justice. *Johnson v. Reagan*, 524 F.2d 1123, 1124 (9th Cir. 1975). And the Court "should
17 grant leave to amend even if no request to amend the pleading was made, unless it
18 determines that the pleading could not possibly be cured by the allegation of other facts."
19 *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir.
20 1990).

21 DISCUSSION

22 Defendant argues that Plaintiff's allegations of retaliation occurring prior to 2022
23 are barred by the statute of limitations. Defendant also argues that Plaintiff failed to plead
24 all the elements for his claims of discrimination and retaliation. And Defendant contends
25 that Plaintiff did not plead an actionable claim for blacklisting under Arizona law.

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the findings of the Arizona Attorney General and issued its right to sue letter in October
2023. (*Id.* at 4.)

1 **Statute of Limitations**

2 An employee must file a Title VII charge with the relevant state agency within 300
3 days of the occurrence of a discriminatory act. *Nat'l R.R. Passenger Corp. v. Morgan*, 536
4 U.S. 101, 108-09 (2002); *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir. 1990)
5 (recognizing that the EEOC deadline also operates as a judicial statute of limitations).
6 "Each discrete discriminatory act starts a new clock for filing charges alleging that act,"
7 and acts occurring outside the statute of limitations do not become timely because they are
8 related to acts within a timely charge. *Morgan*, 536 U.S. at 112-13. A refusal to hire a
9 person, as alleged here, constitutes a discrete act that is actionable under Title VII if based
10 on discrimination. *Id.* at 114.

11 Plaintiff filed a charge with the Civil Rights Division of the Arizona Attorney
12 General's Office and the EEOC on November 2, 2022. (Doc. 21-1 at 8.) The 300-day period
13 runs back to January 6, 2022. Any discrete discriminatory acts that occurred prior to that
14 date are time barred. *Morgan*, 536 U.S. at 109, 122. In the EEOC charge of discrimination,
15 Plaintiff alleged that he received three rejections from Defendant in August 2022. Those
16 allegations, that Defendant failed to hire him based on discrimination or in retaliation for
17 protected activity, are within the statute of limitations. However, his allegations that
18 Defendant rejected his applications in years prior to 2022 are outside the limitations period.

19 The 300-day period is subject to equitable tolling and equitable estoppel, although
20 the Supreme Court has instructed courts to apply them sparingly. *Id.* at 113. "Equitable
21 tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital
22 information bearing on the existence of his claim." *Santa Maria v. Pac. Bell*, 202 F.3d
23 1170, 1178 (9th Cir. 2000) (finding equitable tolling depends on whether there is excusable
24 delay), *overruled on other grounds in Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir.
25 2001)). On the other hand, equitable estoppel focuses on the defendant's conduct and
26 applies "if the defendant takes active steps to prevent the plaintiff from suing in time," such
27 as an employer hiding or misrepresenting material facts. *Id.* at 1176 (quoting *Cada v.*
28 *Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990)).

1 Plaintiff argues that his claims are not time barred, and the Court evaluates his
2 reasons to see if they meet the requirements for equitable tolling or estoppel. Plaintiff
3 argues that he is bringing a claim of "continued discrimination"; therefore, "discrete acts"
4 do not apply. He also contends that Defendant no longer agrees with its defense to the 2016
5 EEOC complaint. In addition, he discusses evidence that he believes supports the merits of
6 his claims.

7 Having reviewed the entirety of the Second Amended Complaint and its
8 attachments, the Court finds that Plaintiff has not put forth a basis for equitable relief from
9 the statute of limitations. First, the Supreme Court rejected the application of a "continuing
10 violation" doctrine to Title VII discrimination and retaliation claims, finding it is a separate
11 violation each time a person is not hired for a discriminatory reason. *Morgan*, 536 U.S. at
12 115 (recognizing a continuing violation only for hostile work environment claims). Second,
13 Plaintiff does not suggest that he did not possess the necessary information to pursue a
14 claim each time he was rejected from employment by Defendant. He was aware of each
15 rejection, and he alleges that he has believed, since 2016, that the rejections were based on
16 racial discrimination or retaliation. No covert actions by Defendant kept this information
17 from him. Plaintiff has offered no equitable reason that the statute of limitations should not
18 apply. Therefore, Defendant is entitled to dismissal of Plaintiff's allegations based on
19 actions occurring prior to January 6, 2022.

20 Discrete acts occurring prior to 2022 also are subject to dismissal because the Court
21 previously dismissed those allegations with prejudice in its ruling on Defendant's first
22 motion to dismiss. (Doc. 19 at 5, 7.)

23 **Sufficiency of the Allegations to State a Discrimination Claim**

24 Within the statute of limitations period, Plaintiff alleges that Defendant rejected him
25 for employment three times due to his race in August 2022. This type of claim is a disparate
26 treatment claim, which alleges that an individual is treated less favorably than others
27 similarly situated to him based on a prohibited criterion, such as race. *Jauregui v. City of*
28 *Glendale*, 852 F.2d 1128, 1134 (9th Cir. 1988) (quoting *Gay v. Waiters' and Dairy*

1 *Lunchmen's Union*, 694 F.2d 531, 537 (9th Cir. 1982)). To make out a prima facie case of
 2 discrimination in hiring, Plaintiff must show that (1) he is a member of a protected class;
 3 (2) he applied and had the qualifications for the position from which he was rejected; (3) he
 4 was denied the position although he was qualified; and (4) Defendant hired someone for
 5 the position that was not in Plaintiff's class (or continued considering other applicants with
 6 qualifications similar to Plaintiff). *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d
 7 1027, 1037 (9th Cir. 2005) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802
 8 (1973)).

9 Defendant argues that Plaintiff's claims should be dismissed because he did not
 10 allege that he was qualified for the positions to which he applied, and he did not allege any
 11 facts regarding who Defendant hired to fill the positions from which Plaintiff was rejected.
 12 The Court agrees. In the Second Amended Complaint and attached documents, Plaintiff
 13 failed to allege any facts about the positions to which he applied in 2022, his qualifications
 14 for those positions, or the people ultimately hired to fill those positions. For this reason,
 15 the Second Amended Complaint must be dismissed for failure to state a claim of
 16 discrimination.

17 **Sufficiency of the Allegations to State a Retaliation Claim**

18 It is unlawful for an employer to discriminate against an employee "because he has
 19 opposed any practice" made unlawful by Title VII, including bringing an EEOC charge.
 20 42 U.S.C.A. § 2000e-3(a). To establish a retaliation claim, Plaintiff must show that he
 21 engaged in a protected activity, he was subjected to an adverse employment decision, and
 22 the adverse action was causally linked to his protected activity. *See Villiarimo v. Aloha*
 23 *Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002). The protected activity alleged by
 24 Plaintiff was his filing of a 2016 EEOC complaint against Defendant. That action qualifies
 25 as a protected activity. *See Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997). Next,
 26 he alleges Defendant has been retaliating against him since then by refusing to hire him.
 27 Failure to hire a person is an adverse employment action. Plaintiff does not identify a causal
 28 link, but he alleges the refusal to hire was due to his engagement in a protected activity.

Defendant contends that, because the 2022 refusal to hire Plaintiff occurred 6 years after the EEOC complaint, there is no causal connection between the two. The Court reviews the relevant facts. In responding to Plaintiff's 2022 EEOC charge, Defendant acknowledged that it excluded Plaintiff from employment beginning in 2016 and continuing through his August 2022 applications. (Doc. 21-1 at 12.) In other words, the decision not to hire Plaintiff in August 2022 (and in the years prior) was made in 2016. Therefore, that decision was not 6 years after his initial EEOC complaint against Defendant. It was within the same year. However, Plaintiff has not alleged a sufficient causal connection between his EEOC complaint and Defendant's decision to preclude him from employment indefinitely. An inference that Defendant acted with retaliatory motive is supported if the adverse employment action "occurred 'fairly soon after the employee's protected expression.'" *Villiarimo*, 281 F.3d at 1065 (quoting *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009-10 (7th Cir. 2000)). Plaintiff has not alleged the date on which he filed his 2016 EEOC complaint,³ or the date on which Defendant imposed its "ban" on his employment with the company. He has not alleged even that the ban was imposed after he filed with the EEOC. In the absence of more specific allegations, Plaintiff has failed to plead a causal link between his protected activity and the adverse employment action.

Blacklisting

With respect to blacklisting, Plaintiff alleges Defendant prevented him from being employed by its Phoenix and Tucson offices (Doc. 21-7 at 14) and blocked him from employment by any of its offices (Doc. 25 at 2-3.) And that, in their applicant tracking system, Defendant failed to state a reason Plaintiff was not to be hired. (*Id.*)

Under Arizona law, a person commits blacklisting if he "knowingly exchanges, solicits or gives out any labor blacklist." A.R.S. § 23-1362(A). A "blacklist" is, essentially, an agreement between "two or more employers of labor" to communicate the name of a person "whereby the laborer is prevented or prohibited from engaging in a useful

³ Review of the attachments to the Second Amended Complaint indicate Plaintiff filed an EEOC complaint in March 2016. (Doc. 21-3 at 20-21.)

1 occupation." A.R.S. § 23-1361(A). Plaintiff fails to state a claim for blacklisting because
2 he has not alleged an agreement between Defendant and any other employer. *See United*
3 *States ex rel. Hamilton v. Yavapai Cmty. Coll. Dist.*, No. CV-12-08193-PCT-PGR, 2015
4 WL 1522174, at *20 (D. Ariz. Apr. 2, 2015), *clarified on denial of reconsideration*, 2015
5 WL 6468211 (D. Ariz. Oct. 27, 2015). Plaintiff also failed to state a claim for blacklisting
6 because he has not alleged that Defendant took actions that prevented him from engaging
7 in an occupation other than employment by Defendant. *See Longariello v. Phoenix Union*
8 *High Sch. Dist.*, No. CV-09-1606-PHX-LOA, 2009 WL 4827014, at *6 (D. Ariz. Dec. 15,
9 2009). Therefore, Plaintiff's blacklisting claim is subject to dismissal.

10 **Conclusion**

11 After liberally construing Plaintiff's Second Amended Complaint, the Court has
12 determined it fails to state any claim upon which relief may be granted pursuant to Federal
13 Rule of Civil Procedure 12(b)(6). Plaintiff has been notified of the deficiencies in his
14 discrimination and retaliation claims twice, once by Defendant's counsel before the filing
15 of the Amended Complaint (Doc. 23, Ex. A), and a second time by the Court before the
16 filing of the Second Amended Complaint (Doc. 19). This is the first time Plaintiff has pled
17 a claim for blacklisting under Arizona law. However, he attached over 180 pages of
18 information to his Second Amended Complaint and none of it suggests he might be able to
19 state a claim for blacklisting. Because Plaintiff has had two opportunities to cure the defects
20 in his complaints and has not done so, the Court finds that further amendment is not
21 warranted and would be unfair to Defendant. *See Foman v. Davis*, 371 U.S. 178, 182,
22 (1962) (citing as reasons to deny amendment, "repeated failure to cure deficiencies by
23 amendments previously allowed, undue prejudice to the opposing party by virtue of
24 allowance of the amendment, [and] futility of amendment").

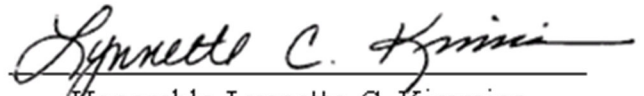
25 Accordingly,

26 **IT IS ORDERED** that Defendant's Motion to Dismiss (Doc. 23) is **GRANTED**.

27 **IT IS FURTHER ORDERED** that the Seconded Amended Complaint is
28 **DISMISSED with prejudice**.

1 **IT IS FURTHER ORDERED** that the Clerk of Court should enter judgment for
2 Defendant and close this case.

3 Dated this 21st day of June, 2024.

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7 Honorable Lynnette C. Kimmins
8 United States Magistrate Judge
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